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IN THE

Supreme Court of the United States

October Term, 1965

No. 829

THE CITY OF COLUMBUS, OHIO,

Petitioner.

vs.

STATE OF OHIO, EX REL., VIRGINIA ROYAL,

Respondents.

BRIEF

After a careful study of the Petition herein, Respondents have concluded that the essence of the Petitioner's prayer for a Writ of Certiorari is twofold in that (1) Respondents failed at the trial level to maintain the necessary burden of proof, and, (2) that, regardless of the evidence produced Respondents have not stated, and do not have a cause of action against Petitioner, because of the provisions of the Federal Aviation Act of 1958.

The impression that Petitioners are again raising the question of the quantum of evidence comes from Petitioner's "STATEMENT" as it appears on pages 3, 4, 5 and

6 of the Petition. Counsel for Respondents must confess that they have difficulty in recognizing the Petitioner's "STATEMENT" as the same case as the one which was tried before the Court of Common Pleas of Franklin County, Ohio.

Without an extensive detailed review of all the evidence presented at the trial, the history of the case reveals that:

A. The Trial Court Found: (Record, Appendix A, page 17)

> "From the evidence adduced there can be no doubt but that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use."

B. The Court of Appeals Ruled: (Record, Appendix A, page 22)

> "The second and third assignment of errors would appear to raise the question that the decision and judgment were contrary to the weight of the evidence, however, counsel for respondents-appellants limit their claim to the question as to whether relators-appellees had maintained the burden of proof which rested on them in this case.
>
> "It is, of course, clear that the evidence was very much in dispute. However, in our opinion, there was some credible evidence on every material issue in the case which, if believed by the trial court, would support and sustain the decision and judgment. The trial court chose to believe the witnesses offered on behalf of relators-appellees. Their testimony was supported to a greater or lesser degree by witnesses offered by respondents-appellants. We are of the opinion that the

second and third assignments of errors are not well taken and must be overruled."

C. The Supreme Court of Ohio followed the pronouncements of *United States against Causby*, 328 U.S. 256, 90 L. Ed. 1206 and *Griggs v. Allegheny County*, 369 U.S. 84, 7 L. Ed. 2d 585 and stated in its opinion:

"The principles found in *Causby* and *Griggs* are applicable to the instant case. There exists a 'taking' in a constitutional sense under Section 19, Article I of the Ohio Constitution, whenever airflights 'are so low and so frequent as to be a direct and immediate interference with enjoyment and use of the land.' And we think that a person's residence is a use for which he is entitled to compensation whenever he can prove a direct and immediate interference with that use.

"The trial court in this cause in its opinion found that 'from the evidence adduced there can be no doubt but (sic) that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use.' The trial court relied on evidence that the air flights disturbed sleep, loosened plaster on walls, and jarred dishes and other objects from shelves.

"The Court of Appeals noted in its opinion that the evidence showed damage to a window, fireplace, and window frame and that 'the 'glide angle height above house' as to each of said properties * * * ranged from a minimum of fifty feet to sixty feet to a maximum of ninety feet.'

"In view of the facts that the appellants agreed to try at one trial the issues of a 'taking' as to 28 different parties, and that the appellees' evidence, if presented, would be cumulative, we do not feel constrained

to disturb the Court of Appeals' judgment on the second and third assignments of error as to the evidence.

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"The ultimate liability of appellants, if any, will be determined in subsequent proceedings. We think substantial justice has been accorded to all the parties."

Petitioner's contentions with reference to the provisions of the Federal Aviation Act of 1958 are without merit.

The property rights interfered with in the instant case are protected by the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 19 of the Constitution of Ohio. Congress cannot destroy or diminish these rights simply by legislation. While reference is made to the Civil Aeronautics Act of 1938 in *United States vs Causby*, 328 U.S. 256, 90 L. Ed., the case was decided with reference to the Fifth Amendment to the United States Constitution. In the *Causby* case the United States made the same arguments as *Petitioners* make here. However, the United States also recognized that the Civil Aeronautics Act of 1938 notwithstanding, the constitutional protection of property rights would still demand that just compensation should be paid in certain cases. As stated at page 261:

"But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment."

And, had counsel for Petitioner seen fit to include the sentence following the quotation (to which emphasis was

added by counsel) from the *Causby* opinion, as it appears on page 8 of the Petition, it would read as follows:

> "Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking."

Also, later in the opinion, at page 267 it is stated:

> "We need not decide whether repeated trespasses might give rise to an implied contract *Cf. Portsmouth Co. v. United States, supra.* If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine. See *Hollister v. Benedict Mfg. Co.*, 113 U.S. 59, 67; *Hurley v. Kincaid*, 285 U.S. 95, 104; *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 21. Thus, the jurisdiction of the Court of Claims in this case is clear."

Regardless of any provisions of the Federal Aviation Act of 1958, no person shall be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation.

There can be no question that Congress does have the power to declare property to be within the public domain in the form of navigable air space, however, to the extent that the use of such navigable air space invades and interferes with one's use and enjoyment of private property and correspondingly destroys the value of the property, just compensation must be made.

As pointed out above, the Supreme Court of Ohio simply

held that the facts in this case as found by the trial court, and as interpreted by the Court of Appeals, brought the case clearly within the pronouncements of the *United States vs. Causby, supra,* and *Griggs vs Allegheny County,* 369 U.S. 84, 7 L. Ed. 2d 585, 82 S. Ct. 581. The Supreme Court of Ohio did not, as is so alarmingly proclaimed by the Petitioner:

> "... in effect erect a wall around the State of Ohio, disregard the established principle of a free right of transit through the navigable airspace of the United States, and say to the citizens of the United States, the right to use this airspace must be purchased."

The theme of the Petition herein seems to be that "... the morass of confusion which has grown up and presently surrounds the field of air commerce ..." has been further confused and perplexed by the decision in this case. As Petitioner states on pages 7 and 8 of its Petition:

> "To contemplate such a confused and chaotic situation is to realize the national importance of this case, and the threat it poses to a clearly evolved and definitely established congressional scheme of air regulation, as set forth in the Federal Aviation Act of 1958. Insofar as this petitioner is aware, this Honorable Court has decided no case expressly involving the Federal Aviation Act of 1958 and its expansion of the navigable airspace of the United States."

Respondents respectfully submit that the foregoing quotation evidences that the only chaos and confusion exists on the part of the Petitioner, and that the Federal Aviation Act of 1958 was expressly involved in *Griggs vs Allegheny County, supra,* as is so clearly demonstrated by the following quotation from page 88 of the Opinion:

> "We start with *United States vs. Causby, supra,*

> which held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of air easement for which compensation must be made. At the time of the *Causby* case, Congress had placed the navigable airspace in the public domain, defining it as 'airspace above the minimum safe altitudes of flight prescribed' by the C. A. A. 44 Stat. 574. We held that the path of the glide or flight for landing or taking off was not the downward reach of the 'navigable airspace.' 328 U.S., at 264. Following the decision in the *Causby* case, Congress redefined 'navigable airspace' to mean 'airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.' 72 Stat. 739, 49 U. S. C. § 1301 (24). By the present regulations the 'minimum safe altitudes' within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, '(e)xcept where necessary for take-off or landing.' But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. 328 U.S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'' 328 U.S., at 265.

The law governing the case at bar is clear and well settled. To plagiarize and paraphrase from this Court's opinions; while the owner of property does not in any physical manner occupy that stratum of space above his property or make use of it in the conventional sense, at low altitudes it is so close to the land that continuous invasions of such air space which affect the use of the surface of the land itself and which cause a depreciation of its fair market value are as an incident of ownership, in the

same category as invasions of the surface; and, when flights of aircraft in connection with the public use are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land, the owner's loss, not the taker's gain, requires that just compensation be made.

Accordingly, Petitioner's prayer for Writ of Certiorari should be denied.

Respectfully submitted,

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